IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWANGESI, J.A., MWANDAMBO, J.A., And LEVIRA, J.A)

CRIMINAL APPEAL NO. 33 OF 2017

OSCAR JUSTINIAN BURUGU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mgonya, J.)

dated the 30th day of November, 2016
in
DC Criminal Appeal No. 73 of 2015

JUDGMENT OF THE COURT

16th & 25th November, 2020

MWANDAMBO, J.A.:

Oscar Justinian Burugu, the appellant herein, was a servant of law serving as Resident Magistrate at Urambo District Court in Tabora. On 12th April 2013 he found himself standing on the dock as an accused person in Criminal case No. 49 of 2013 answering a charge with three counts before the Resident Magistrate's Court of Tabora in connection with corruption transactions contrary to section 15(1) (a) and (2) of the Prevention and Combating of Corruption Act, No. 11 of 2007 - now Cap. 329 R.E 2019 (henceforth the PCCA). The trial court found sufficient evidence to sustain

the charge. It convicted and sentenced him to pay a fine of TZS 500,000.00 on each count failing which appellant was to serve three years' imprisonment on each count to run concurrently. The appellant's appeal to the High Court sitting at Tabora was dismissed in its entirety and hence the instant appeal.

The appellant's arraignment and his eventual conviction was precipitated by allegations connected with the events arising from Criminal Case No. 27 of 2013; **Republic v. Phillipo Raymond Changala**. The appellant who was a District Resident Magistrate In-charge for Urambo, District Court, presided over that case instituted on 15th March, 2013 in which the accused stood charged with stealing by servant involving a sum of TZS 120,000,000.00 the property of NMB Bank PLC. Earlier on that day, Raymond Lucas Changala (PW1), the accused's father had an audience with the appellant in his chambers with a view to discussing with him bail for his son. At that time, the case had not yet been instituted. The record shows that PW1 had some documents with him which he showed to the appellant indicating that he had a house in Dodoma. However, upon inspection, PW1 was told by the appellant that the documents were inadequate for the purposes of the bail and thus he was to look for other documents. Moments later, the appellant is alleged to have asked PW1 to look for TZS

5,000,000.00 for the purpose of the bail to which PW1 replied that the amount was beyond his ability. All the same, the appellant gave PW1 his mobile phone number and asked him to hold on until such time his son was brought in court to plead to the charge in the open court sometime later.

After pleading not guilty to the charge, the appellant intimated to the accused that bail was open subject to fulfilment of any of the three conditions he had set. One of such conditions was execution of cash bail bond of TZS 120,000,000.00. However, the accused could not immediately meet any of the conditions and so he was ordered to remain in custody. Three days later, PW1 managed to secure two persons who could stand as sureties for his son. He once again approached the appellant in his chambers on 18th March, 2013 carrying with him documents which the appellant inspected and asked PW1 to deliver to a court clerk. In the meantime, PW1 was told to ask the sureties to appear in court for bail application. The two persons going by the names of Stephen Kiruku and Abdallah Sudi (PW3) readily obliged. PW1 along with PW3 and Stephen Kiruku had an opportunity to meet the appellant in his chambers whereupon he asked them to wait in the open court. However, later on, the appellant rejected the documents meant to support the application for bail for lack of photos evidencing the houses on the respective

plots. Undaunted, PW1, PW3 and Stephen Kiruku approached the appellant in his chambers seeking clarification on the matter. The appellant is said to have been utterly disappointed by PW1's failure to live up to his promise to facilitate the grant of bail to his son. All the same, the following day, on 19th March, 2013, PW1 sent photos of the houses earmarked to support the application for bail but yet again the appellant rejected them. He directed PW1 and his colleagues to submit good photos together with valuation reports of their houses verified by the respective Hamlet chairpersons. PW1's efforts to meet the appellant in his chambers did not move him. He is said to have stuck to his guns asking him to comply with the earlier instructions to him; parting with TZS 5,000,000.00 to the appellant in exchange for the bail to his son.

On 20th March, 2013, PW1 and his colleagues went to the appellant's office with documents in compliance with his instructions made the previous day. Initially, the appellant appeared to have been satisfied with the documents and told PW1 to wait in the open court where his son's case was to be called moments later. However, the mission did not succeed yet again, for the appellant demanded submission of title deeds to the plots to the houses earmarked as security for the bail. Later on the same day, PW1 and

the prospective sureties had an audience with the appellant in his chambers with a view to explaining to him hardships in securing title deeds to their plots but all in vain. Subsequently, PW1 is said to have been scolded by the appellant when his colleagues had left him with the appellant. PW1 reported the matter to the Prevention and Combating of Corruption Bureau (the PCCB) for intervention.

That notwithstanding, PW1 continued to pursue bail for his son which involved Stella Mukankusi Masokola (PW2) who was also a fiancé of his son. After obtaining the appellant's telephone numbers from PW1, PW2 contacted the appellant and managed to meet at his house on 21st March, 2013. Having met the accused and introduced herself, PW2 pleaded with him to grant bail to her fiancé and upon some discussion which entailed the appellant scolding PW2, he (the appellant) is recorded to have asked her to look for more money up to TZS 3,000,000.00 and the balance to be made after the grant of the much sought bail. However, the record shows that PW2 had only TZS 1,000,000.00 which she allegedly gave the appellant. This amount was in addition to TZS 1,000,000.00 which was claimed to have been received from PW1 for the same purpose. Thereafter, PW2 was given a piece of paper on which the appellant asked her to jot down terms of affidavits which the

sureties were to depone in support of the application for bail. PW1, Abdallah Sudi Mohamed (PW3) and Stephen Kiruku deponed to the affidavits on 22 March, 2013. At that time, PW1 had already reported the appellant to the office of the PCCB at Urambo for intervention.

After some back and forth follow-ups, the appellant granted bail to PW1's son on 3rd April, 2013. Subsequently, acting on PW1's information, the PCCB instituted a criminal case against the appellant on 12th April 2013. The charge was predicated on section 15 (1) (a) and (2) of the PCCA. Essentially the particulars on the first count alleged that the appellant did, on 15th March 2013 solicit advantage in the form of money for the sum of TZS 5,000,000.00 from PW1 as an inducement for him to grant bail to his son. In the second count, the prosecution alleged that on 18th March 2013, the appellant corruptly obtained TZS, 1,000,000.00 from PW1 as part of TZS. 5,000,000.00 as an inducement for the grant of bail to Phillipo Raymond Changala facing a criminal case before Urambo District Court. Prosecution alleged in the third count that on 21st March 2013, the appellant corruptly obtained TZS 1,000,000.00 from Stella Mukankusi Masokola (PW2) a fiancé of Philipo Raymond Changala as an inducement for the grant of bail to PW1's son.

As alluded to earlier, the trial court found sufficient evidence to prove the case against the appellant on all counts on the required standard. The evidence upon which the trial court convicted the appellant came from Raymond Lucas Changala (PW1), Stella Mukankusi Masokola, (PW2), Abdallah Sudi Mohamed (PW3) and Emmanuel Stenga (PW4). The latter was an employee of the PCCB at Urambo. The conviction was followed by the respective sentences. The appellant opted to pay a fine of TZS. 500,000.00 on each count in lieu of imprisonment.

The appellant's appeal to the High Court sitting at Tabora was predicated on three grounds of complaint namely; that the case against him was not proved beyond reasonable doubt, the trial court failed to accord weight to his evidence in defence and unfair trial by reason of the trial court's failure to avail the appellant with copies of proceeding before he entered his defence.

The first appellate court (Mgonya, J) found no merit in any of the grounds and dismissed the appeal. From that decision, the appellant appeals to this Court on four grounds of appeal paraphrased as follows:

1. *The first appellate court erred in not holding that the refusal to avail the appellant with copies of proceedings before he entered his defence amounted to unfair trial.*
2. *The first appellate Judge erred in failing to evaluate evidence properly and hold that the case against the appellant was not proved on the required standard.*
3. *The first appellate court erred in law and fact in failing to find that the appellant's defence was not evaluated and considered by the trial court.*
4. *The first appellate Judge erred in dismissing the appellant's appeal without giving proper consideration and weight to the authorities cited by the appellant in support of the grounds of appeal.*

In arguing the appeal, the appellant who appeared in person chose to combine his arguments on grounds 1 and 4. However, in the course of his submissions, he abandoned ground 4 and instead, he directed his arguments on ground 3 in which he complains that his evidence in defence was not evaluated and considered.

The appellant's complaint in ground one was that he was unfairly tried on account of the trial court's refusal to supply copies of proceedings before he entered his defence. The appellant anchored his argument on the Court's decision in **Kabula Luhende v. R**, Criminal Appeal No. 281 of 2014

(unreported) in which this Court underscored the constitutional requirement to accord the parties a fair hearing whose violation results in nullification of the proceedings and the resultant decision. According to the appellant, failure to avail him with the copies of proceedings before entering his defence constituted an unfair trial resulting in the nullification of the trial. He placed his reliance on Article 14(3) (b) of the International Covenant on Civil and Political Rights (the ICCPR) cited in **Kabula Luhende's** case (supra).

The appellant's main complaint in support of ground three was that in its judgment, the trial court did not consider his evidence which, according to him, had it been subjected to scrutiny against that of the prosecution, the trial court could have found that the prosecution had not proved its case on the required standard. In elaboration, the appellant faulted the first appellate court for failing to hold that the trial court did not consider his exhibits particularly PW1's cautioned statement (exhibit D1) tendered to contradict PW1's evidence on the allegation that he solicited and received money as an inducement to grant bail to his son.

To buttress his arguments, the appellant referred the Court to its previous decision in **Leonard Mwanashoka v. R** Criminal Appeal No. 226

of 2014 and **Jeremia John & 4 Others v. R,** Criminal Appeal No. 416 of 2013 (both unreported) for the proposition that failure to consider defence evidence vitiates conviction.

Submitting on ground 2, the appellant criticized the trial court and the first appellate court on several treats. One, failure to properly evaluate the evidence of both the prosecution and defence. According to the appellant, the statement at page 266 of the record alluding to the trial court's consideration of the defence evidence was not borne by the record. Two, the two courts below relied on the evidence of PW1 and PW2 in the absence of any corroborative evidence from independent witnesses. So was PW3's and PW4's evidence. According to the appellant, the evidence which the trial court relied on to convict the appellant was largely circumstantial which should have been corroborated by independent evidence. The appellant argued that it was improper for the prosecution to charge him alone without PW1 and PW2 as accomplices to the offences. He referred the Court to **Ally Bakari & Another v. R**, [1992] T.L.R 10 and **Jackson Thomas v. R** Criminal Appeal No. 229 of 2013 (unreported) for the proposition that where the evidence against the accused is wholly circumstantial, the facts from

which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt.

Mr. Tumaini Ocharo, the learned State Attorney who represented the respondent/Republic resisted the appeal. His response to the complaint in ground one was that the trial court violated no law in refusing to supply the appellant with copies of proceedings and so the complaint on unfair trial is misconceived. The learned State Attorney distinguished the application of **Kabula Luhende**'s case (supra) to the instant appeal because the issue in that case related to the trial judge making a finding of guilt against the accused (appellant) in his ruling on a case to answer before hearing the defence.

As to the failure to consider defence evidence, Mr. Ocharo contended that the trial court considered it based on the points for determination it had formulated and determined each point after considering the evidence of not only the prosecution but also the defence as rightly held by the first appellate court. Mr. Ocharo urged the Court to dismiss both grounds for lack of merit.

Responding to ground two, Mr. Ocharo argued that contrary to the appellant, the charge involving soliciting and accepting advantage in form of cash was proved on the required standard. According to him, the appellant

did not dispute soliciting advantage rather, receiving TZS. 2,000,000.00. With regard to the appellant's claim that PW1 and PW2 were accomplices to the offences, Mr. Ocharo argued that the duo had no evil mind (mens rea) to induce the appellant to accept bribe for the grant of bail to PW1's son. Accordingly, the learned State Attorney argued, PW1 and PW2 could not have been joined in the case as accomplices.

On the sufficiency of circumstantial evidence, Mr. Ocharo argued relying on **Hamidu Mussa Timotheo & Another v. R** [1993] T.L.R 125, that the linking chain in such evidence must not be broken which was the case in the instant appeal and thus the prosecution discharged its duty to prove its case against the appellant beyond reasonable doubt. On the foregoing submissions, the learned State Attorney urged the Court to dismiss the appeal for lack of merit.

In his short rejoinder, the appellant argued that **Kabula Luhende**'s case (supra) discussed a wide principle in relation to according parties fair trial holding that the right to fair hearing is wide enough to embrace the right to access to copies of proceedings before an accused enters his defence. On the other hand, the appellant argued that the two courts below failed to evaluate evidence properly as a result of which they both arrived at

erroneous findings. Under the circumstances, the appellant argued, the Court should step into the shoes of the High Court and evaluate evidence with a view to arriving at its own findings on the authority of **Deemay Daati & 2 Others v. R.** [2005] T.L.R. 132.

Upon hearing the arguments for and against the appeal, we now proceed to make our determination. It will be clear by now that the determination of this appeal turns on grounds 1, 2 and 3.

We shall begin our discussion with the complaint on the trial court's failure to supply the appellant with copies of proceedings before he entered his defence. The appellant has bitterly criticized the trial court and the first appellate court on this as constituting an unfair trial. On which Mr. Ocharo has taken a different view. We agree with the learned State Attorney that the Criminal Procedure Act, Cap 20 [R.E. 2019] (the CPA) makes no provision for availing accused persons with copies of proceedings before standing a witness box in defence. We also agree with him that neither **Luhende v. R.** nor **Jeremia John v. R.** (supra) made any express determination on the requirement to supply copies of proceedings to an accused person before he enters his defence. The two cases merely discussed standards of a fair trial. Apparently, this is the view the learned first appellate Judge took in

dismissing ground one of the appeal before her. However, we think the learned first appellate Judge was not necessarily correct in her reasoning in determining ground one of the appellant's appeal before her. Luckily we are not traversing in a virgin territory. The Court has had an occasion to discuss a similar issue in **Alex John v. R.,** Criminal Appeal No. 129 of 2006 (unreported) in some detail. Applying a liberal interpretation to the right to a hearing enshrined under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977 [Cap. 2 R.E 2002], the Court stated that:-

> *".... So, an accused's right to give evidence on his own behalf, simply means that he must be given a fair trial. This right would be illusory were an accused person ordered to conduct his defence without being afforded reasonable opportunity to present his case fairly and fully to the court. Such opportunities, include, being supplied with copies of court proceedings when requested....." [at page 16]*

The Court subscribed to the holding of the erstwhile European Commission of Human Rights on access to facilities which had stated that:-

> *"....an accused and/his counsel must be granted access to appropriate information, files and documents necessary for the preparation of the defence.... Such access in our considered*

opinion, should be granted before the trial, during the trial and after the trial, in case of a conviction for appeal purposes ..."(at page 26).

In the light of the foregoing, the reasons given by the lower courts did not justify the refusal to avail the appellant with the copies of proceedings he had requested. Both courts below strayed into an error in their decisions.

Next for our determination is whether the refusal prejudiced the appellant. With respect we decline to accept the appellants' contention. We say so because, one; unlike in **Alex John v. R** (supra) in which a defence was taken after 7 months from the date the prosecution closed its case, this is not the case in the present appeal involving a short interval in which a judicial officer was an accused. Secondly, apart from the appellant's general complaint, it has not been suggested by him that it prejudiced him in his defence. The record bears us out that he marshalled his defence irrespective of the non-availability of copies of proceedings. Undeniably, as can be gleaned from page 94 of the record of appeal, the appellant requested for copies of proceedings to assist him to determine whether he was to call any witnesses and/or produce exhibits. After the trial court's ruling declining the request, the appellant expressed his no objection to it but requested for more time to prepare for his defence with his advocate which the trial court

readily granted. The following day (i.e. 23/05/2014), on which the case was to proceed for hearing of the defence case, the appellant prayed for an adjournment to enable him call his two witnesses from Urambo. He also seized the opportunity to give notice to produce certain documents from the prosecution for use in his defence. The trial court granted both prayers and the hearing was adjourned to 6th June, 2014.

It is evident from the record that on the resumed hearing, the appellant marshalled his defence without his advocate producing five documentary exhibits including PW1's caution statement (exh. D1) and extract of the proceedings in Criminal Case No. 27 of 2013 (exh. D2). At the end of his defence, the appellant closed his case dispensing with the need to call his other two witnesses he had indicated to call earlier on. Under the circumstances, we do not share the appellant's view that the refusal to avail him with copies of proceedings prejudiced his trial. This is more so because, the appellant has not pointed out anything which he failed to canvass in defence as a result of the refusal. In the upshot, except for our holding that the refusal to avail the appellant with copies of proceedings was unjustified, the refusal in this appeal cannot result into the nullification of the trial culminating into his conviction.

We now proceed with our discussion on the appellant's complaint regarding the trial court's failure to consider his defence in its judgment. We agree with him that as a general rule expressed on the authorities he cited to us, failure to consider defence evidence is fatal to the conviction. The cases of **Leonard Mwanashoka** and **Jeremia John & 4 others** (supra) are illustrative of the legal position on which Mr. Ocharo had no dissension. He only contended that the trial court considered the appellant's defence evidence as reflected at page 205 of the record of appeal. We shall revert to that later. In the meantime, we find it apt to put it clear that conviction will not necessarily be quashed by this Court merely because the two courts below failed to consider defence evidence.

The Court has taken the view that failure to consider defence is one of the exceptional circumstances where it has to interfere with the concurrent findings of the two courts below. In other words, the failure constitutes misapprehension of the evidence causing miscarriage of justice attracting the court's intervention to disturb the concurrent findings of two courts below. See for instance: **Julius Josephat v. Republic,** Criminal Appeal No. 3 of 2017 (unreported) citing **Paschal Christopher & 6 others v. The DPP**, **Joseph Safari Massay v. R**, Criminal Appeal No. 125 of 2012 and

Felix s/o Kichele & Another v. R, Criminal Appeal No. 159 of 2005 (both unreported). That means, as of necessity we shall step into the shoes of the first appellate court and evaluate evidence on record including that of the defence if we are satisfied that such evidence was not considered. In reality, the case of **Deemay Daati v. R** (supra) cited to us by the appellant says as much. It is worth mentioning here that consideration of the defence entails evaluation of it from both the prosecution and defence. It is quite distinct from narration of the defence, for the former means scrutiny of the evidence before making findings. See for instance: **Bahati S/o Mdobofu v. R,** Criminal Appeal No. 8 of 2013 and **Omari Mrisho v. R,** Criminal Appeal No. 38 of 2012 (both unreported).

In addressing the complaint, the High Court dismissed it holding that the trial court analyzed the evidence of both sides citing page 42 and 44 of the record as evidence of such evaluation. Winding up her discussion the learned Judge concluded:

> *".... I am therefore satisfied that, the testimonies of all prosecution witnesses (PW1-PW4) on [the] one hand and that of defence (DW1) on the other hand, were equally treated, considered and evaluated by the trial court [at pp 266-267 of the record].*

However, our examination of the trial court's judgment including pages 42-44 thereof shows no such evaluation and assessment of evidence of both the prosecution and defence. On the contrary, what we gather from the entire judgment is, but narration of the evidence rather than evaluation. In reality, one may not fail to agree with the appellant that the trial court glossed over discussing evidence both oral and documentary. For instance, whereas the appellant tendered in evidence PW1's caution statement (exh. D1) meant to contradict his oral testimony regarding payment of TZS 1,000,000.00 by PW1 which he denied when responding to a question in cross-examination, the trial court did not make any reference to that piece of evidence. Similarly, whereas DW1 (the appellant) testified that it is PW1 who induced him to grant bail to his son and offered TZS 500,000.00 for that on 15th March, 2013, the trial court (at page 207 -208) only considered PW1's evidence. The trial court did not subject PW1's evidence to that of DW1 before it came to the conclusion that PW1's evidence proved that the appellant solicited and accepted TZS 1, 000, 0000.00 from PW1 as part payment for the grant of bail to his son in Criminal Case No. 27 of 2013. In our view, had the first appellate court directed its mind properly to the foregoing, we have no doubt that it should have arrived at a different

conclusion. We say so because PW1's evidence at page 49 of the record reveals that he did not give corruption to the accused.

That piece of evidence was not controverted in re- examination and a little later, PW1 is recorded to have said as follows at page 52:-

> *"The circumstances are the ones which may lead believe the accused took my money. That means I gave him Tshs. 1,000,000/=.*

The above taken together with what PW1` stated as in answer to a question in cross examination at page 49 of the record evidence left lingering doubts in the prosecution's case on whether the appellant corruptly received TZS 1,000,000.00 from PW1 as an inducement for the grant of bail to his son. We are unable to agree with Mr. Ocharo, that the finding of guilt on the second count sustained by the first appellate court was supported by sufficient evidence on the required standard.

It is for the foregoing we are compelled to interfere with the concurrent findings of the two courts below in relation to the guilt of the appellant on the second count namely; corruptly receiving TZS 1,000,000.00 from PW1. That finding was a result of improper evaluation of evidence on record and

it is accordingly set aside. That takes us to ground two in which the appellant contends that his conviction was against the weight of evidence.

We have already held that the appellant's conviction on the second count was against the weight of evidence; it was a result of misapprehension of the evidence. Our discussion will thus focus on count one and three. Count one relates to corruptly soliciting bribe whereas count three is about accepting advantage in the form of money; a sum of TZS 1,000,000.00 from PW2.

The appellant's criticism against the two courts below was multifaceted but we have already dealt with misapprehension of the evidence having a bearing on the second count. The appellant's main complaint was that the evidence which resulted into his conviction was circumstantial which required corroboration. The remaining aspect touches on lack of corroborative evidence of prosecution witnesses particularly PW1 and PW2. According to the appellant, their evidence was circumstantial which should have been corroborated by independent evidence. It is trite law that circumstantial evidence cannot be acted upon unless the evidence irresistibly points to the guilt of the accused. In other words, the chain of circumstantial evidence should not be broken at any stage to sustain conviction. See: **Hamidu**

Mussa Timotheo & Majidi Mussa Timeotheo v. R (supra). Much as the appellant would have the Court hold that the evidence which resulted in his conviction was circumstantial which should have been corroborated, we do not entirely agree with him that such evidence was indeed circumstantial as shall become apparent shortly. The evidence in support of the first count on soliciting was, by and large, adduced by PW1 corroborated by PW2 and PW3. The first appellate court reproduced some extracts of PW1's evidence notably; what the appellant told PW1 when he had an audience with him for the first time in his chambers on 15th March 2013. To start with, PW1 told the trial court that the appellant asked PW1 for TZS 5,000,000.00 to facilitate bail to his son but when PW1 said that he had no such sum, the appellant is recorded to have asked him if he had any money to which PW1 replied that he only had TZS 1,000,000.00 and some small amount for transport. That piece of evidence was not controverted in cross examination. It is trite that failure to cross examine a witness on material evidence is tantamount to admission of that evidence. See: - **Martin Misara v. R.,** Criminal Appeal No. 428 of 2016, **Bashiri S/o John v. R,** Criminal Appeal No. 486 of 2016 and **Thobias Michael Kitavi v. R,** Criminal Appeal No. 31 of 2017 (all unreported).

Equally significant is the fact that the appellant did not deny having an audience with PW1 in his chambers between 15th and 22nd March 2013. Undeniably, he gave PW1 his mobile phone number discussing the issue of bail to his son outside the ordinary course of business. Yet again, the substance of this evidence was not controverted in cross- examination. To clinch it all, PW3 came out louder when he testified that the appellant became furious against PW1 for reneging from his promise to look for money to facilitate bail to his son. (See pages 75&76 of the record). PW3 was not cross-examined on that and so his evidence remains unchallenged. Under the circumstances, like the first appellate court, we are satisfied that the prosecution's evidence proved beyond reasonable doubt that the appellant solicited bribe from PW1 to facilitate the grant of bail to his son. That means that the concurrent findings by the trial court and the first appellate court on the guilt of the appellant in the first count have not been successfully assailed to attract our interference.

Regarding the third count, the trial court relied on the evidence of PW2 who, using the appellant's telephone contacts she had been given by PW1, had access to the appellant at his home on 21st March 2013. The appellant did not dispute meeting PW2 at his house. He only disputed the fact that

PW2 entered into the house. To disprove that, the appellant mentioned Wilson Endrew as the person who was present when PW2 visited him on the material date. At his own election, the appellant dispensed with calling the said Wilson Endrew to lend credence to his evidence that PW2 did not cross his house's fence. Be it as it may, like the first appellate court, we are satisfied that PW2 gave credible evidence that she gave the appellant TZS 1,000,000.00 as part of the amount he solicited from PW1 as an inducement for the grant of bail to PW1's son, who was PW2's fiancé. PW2 gave an uncontroverted evidence that before giving the amount, the appellant asked her to switch off her mobile phones and upon parting with that amount, he directed PW2 to jot down on a piece of paper he had provided some information which could be contained in affidavits to support the application for bail. In actual fact, there is a close proximity between the date on which PW2 met the appellant and the signing of the affidavits which were presented before the District Court to support the application for bail.

The contents of the affidavit (exh D3 collectively) and PW2's testimony at page 66 of the record are too closely connected to have been just a coincidence. In our view, if circumstantial evidence has anything to go by, the meeting of the appellant by PW2 on 21st March 2013, the signing of the

affidavits on 22nd March 2013 and their presentation in court on 22nd March 2013 are so linked to form an unbroken chain pointing to the appellant's guilt for soliciting and receiving TZS 1,000,000.00 from PW2 as an inducement for the grant of bail to her fiancé. During cross examination, PW2 was not shaken and she stated:

> *"I gave you a total of TShs. 1,000,000/=. [It] was in a currency of ten thousand notes (Noti za Shs. Elf 10,000, 10,000/=)."*

Later on, PW2 stated that:

> *"It is me who notified [the] PW1 that I came to you, gave you the money and then you assisted me to draw an affidavit."* [at P. 73].

Our decision in **Goodluck Kyando v. R** [2006] T.L.R 363 in support of the proposition that every witness is entitled to credence except where there are cogent reasons to the contrary cannot be more apt on this. We can only disregard PW2's credibility if there is evidence of improbable or implausible evidence or evidence materially contradicted by evidence by another witness. We have no material to doubt PW2's credibility in this appeal. In the upshot, we have found no good reason to fault the trial court as well as the first appellate court on their concurrent findings of the

appellant's guilt on the third count. Consequently, except for our holding on the second count, there is no merit in ground two and we dismiss it.

In the light of the foregoing, we hold that the appeal is devoid of merit except for the finding in relation to the second count on which we have held that the conviction was against the weight of evidence. The appellant's conviction on that count is quashed and sentence set aside. That said, save to the extent indicated, the appeal stands dismissed.

DATED at **TABORA** this 25th day of November, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of November 2020, in the Presence of appellant in person and Mr. Tumaini Pius Ocharo State Attorney for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL